SUPREME COURT

MAY 2002

IN THE SUPREME COURT TERM

APPEAL FROM THE COURT OF APPEALS
The Honorable Henry Saad, Presiding

JEFFREY L. FRAZZINI
Plaintiff-Appellee,

and

AAA OF MICHIGAN
Intervening Plaintiff-Appellee,

v

TOTAL PETROLEUM, INCORPORATED
Defendant-Appellant.
_____/

Docket no. 119362

BRIEF ON APPEAL - AMICUS CURIAE MICHIGAN SELF-INSURERS' ASSOCIATION

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATUTES

CASES

STATEMENT OF QUESTION PRESENTED

I

WHETHER AN EMPLOYEE IS ELIGIBLE FOR WORKERS' DISABILITY COMPENSATION ONLY BY ESTABLISHING THAT EMPLOYMENT WAS THE MECHANISM FOR A PERSONAL INJURY AND ALSO THAT THE EMPLOYEE WAS PERFORMING SERVICE WHICH WAS CONTEMPLATED BY THE CONTRACT OF EMPLOYMENT WHEN INJURED

Plaintiff-appellee Jeffrey L. Frazzini answers "No."

Intervening plaintiff-appellee AAA of Michigan answers "No."

Defendant-appellant Total Petroleum answers "Yes."

Amicus curiae Michigan Self-Insurers' Assoc answers "Yes."

Court of Appeals answered "No."

Workers' Compensation Appellate Comm answered "Yes."

Board of Magistrates answered "No."

STATEMENT OF FACTS

Plaintiff-appellee Jeffrey L. Frazzini (Employee) was a diabetic who lost control because of an insulin reaction and crashed while driving to appointments for defendant-appellant Total Petroleum, Incorporated (Employer). (131a-133a).

The Board of Magistrates (Board) ordered workers' disability compensation with the decision that the personal injuries which the Employee experienced from the crash arose out of and in the course of employment because driving had increased the danger of injury. *Frazzini v Total Petroleum, Inc*, unpublished order and opinion of the Board of Magistrates, decided on March 30, 1998 (Docket no. 033098089). (376a-391a)

The Workers' Compensation Appellate Commission (Commission) reversed because "the risk emanates from [the] non-work-related diabetic condition [of the Employee]." *Frazzini v Total Petroleum, Inc*, 1999 Mich ACO 2944, 2949. (396a)

The Court of Appeals granted leave to appeal, *Frazzini v Total Petroleum, Inc*, unpublished order of the Court of Appeals, decided on April 28, 2000 (Docket no. 223694) (399a), consolidated with *Hill v Faircloth Mfg Co* (Docket no. 221335), *Frazzini v Total Petroleum, Inc*, unpublished order of the Court of Appeals, decided on May 1, 2001 (Docket no. 223694) (400a), and reversed, sub nom *Hill v Faircloth Mfg Co*, 245 Mich 710; 630 NW2d 640 (2001). (401a-408a)

The Court granted leave to appeal and directed briefing the question "whether the Court of Appeals decision in this case is consistent with *Van Gorder v Packard Motorcar Co*, 195 Mich 588 [162 NW 107] (1917), and, if not, whether Van Gorder should be overruled." *Frazzini v Total Petroleum, Inc*, 465 Mich 946; - NW2d - (2002). (409a)

SUMMARY OF ARGUMENT

The text and context of a statute in the Workers' Disability Compensation Act of 1969 (WDCA), MCL 418.101; MSA 17.237(101), et seq., requires that an employee establish two particular circumstances about a personal injury in order to establish eligibility

for compensation. These two circumstances are that employment was *how* and *when* injury occurred. *Where, why,* and *what* injury occurred are recognized by other statutes as margins of these two circumstances.

This was all quite well settled until the Court announced a process of judicial activism in *Van Dorpel v Haven-Busch Co*, 350 Mich 135, 153-154; 85 NW2d 97 (1957) which was then used to proclaim a set of abstract rules between *Carter v General Motors Corp*, 361 Mich 577; 106 NW2d 105 (1960) and *Kostamo v Marquette Iron Mining Co*, 405 Mich 105; 274 NW2d 411 (1979). This process provoked a comprehensive redacting of the WDCA but has left a confusing residue.

ARGUMENT

I

AN EMPLOYEE IS ELIGIBLE FOR WORKERS' DISABILITY COMPENSATION ONLY BY ESTABLISHING THAT EMPLOYMENT WAS THE MECHANISM FOR A PERSONAL INJURY AND ALSO THAT THE EMPLOYEE WAS PERFORMING SERVICE WHICH WAS CONTEMPLATED BY THE CONTRACT OF EMPLOYMENT WHEN INJURED

This case requires the application of a statute in the WDCA which was effective on January 1, 1982, when 1980 PA 357 was effective. MCL 418.301(1); MSA 17.237(301)(1), first sentence. The statute states that, "[a]n employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act."

This statute applies because the Employee experienced medically identifiable damage to the body which was separate from the existing condition or disease of diabetes mellitus which constitutes a *personal injury* within the rubric of the statute. *Miklik v Michigan Special Machine Co*, 415 Mich 364; 329 NW2d 713 (1982). This is not a case of an employee who experienced either some transitory symptoms of an existing condition or illness. Those statutes in the WDCA concerning disease do not apply because the Employee

did not experience an occupational disease within the rubric of MCL 418.401(2)(b); MSA 17.237(401)(2)(b), first sentence. Diabetes mellitus is an ordinary disease of life which is alone not compensable. Section 401(2)(b), second sentence.

This statute applies because it was effective when the Employee was injured. The Court has always held that the time of the personal injury experienced by an employee establishes the statutes in the WDCA which apply to determine the eligibility to compensation from an employer. *Tarnow v Railway Express Agency*, 331 Mich 558, 563; 50 NW2d 318 (1951). *Miklik, supra*. *Hurd v Ford Motor Co*, 423 Mich 531, 535; 377 NW2d 300 (1984). *White v General Motors Corp*, 431 Mich 387, 393; 429 NW2d 576 (1988). *Sokolek v General Motors Corp*, 450 Mich 133, 147-148; 538 NW2d 369 (1995) (BOYLE, J., concurring in part and dissenting in part).

A. THE STATUTE THAT APPLIES IS CLEAR

The words and phrases in any statute are first and best understood from common and approved usage. *Twp of Leoni v Taylor*, 20 Mich 148 (1870). *Reetz v Schemansky*, 278 Mich 626; 270 NW 811 (1937). *Stadle v Twp of Battle Creek*, 346 Mich 64; 77 NW2d 329 (1956). *Jones v Grand Ledge Pub Schools*, 349 Mich 1; 84 NW2d 327 (1957). *Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999). The Court held in *Twp of Leoni, supra*, 154-155, that,

> "[i]n every exposition of a statute, the intention of the Legislature is undoubtedly the end to be sought; but the construction to be given should not be repugnant to the clear meaning of the words. The courts are not at liberty, in order to effectuate what they may suppose to have been the intention of the Legislature, to put a construction upon the enactment not supported by the words, although the consequences should be to defeat the object of the act. When the meaning of the words is plain and obvious, the only safe course is to suppose the Legislature to have intended those things which the words denote, and to abstain from all attempts to discover a different meaning by suppositions and conjectures."

More recently, the Court said in *Sun Valley Foods Co, supra*, 236-237,

> ". . . our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). See also *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). This task begins by examining the language of the statute itself. The words of a statute provide 'the most reliable evidence of its intent . . . .' *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 246 (1981).
>
> * * *
>
> . . . we consider both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). See also *Holloway v United States*, 526 US 1; 119 S Ct 966; 143 L Ed 2d 1 (1999). As far as possible, effect should be given to every phrase, clause, and word in the statute. *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994). The statutory language must be read and understood its grammatical context, unless it is clear that something different was intended." (citation omitted)

The statute is a complex sentence because it has a main clause which is *an employee . . . shall be paid compensation as provided in this act* and a subordinate clause which is *who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury*. This can be appreciated by the use of commas that offset the subordinate clause to modify the antecedent noun phrase *an employee* which is the subject of the sentence. *Kales v City of Oak Park*, 315 Mich 266, 271; 23 NW2d 658 (1946). *Winokur v Michigan State Bd of Dentistry*, 366 Mich 261, 266; 114 NW2d 233 (1962). *Sun Valley Foods Co, supra*, 237. In *Sun Valley Foods Co, supra*, 237, the Court recognized that, "[i]t is a general rule of grammar and of statutory construction that a modifying word or clause is confined solely to the last antecedent . . . (citations omitted)"

The main clause *an employee . . . shall be paid compensation as provided in this act* is grammatical because it contains the subject, verb, and object of the sentence. The subject is the noun phrase *an employee* composed of the indefinite article *an* and the concrete noun *employee*. Not surprisingly, the subject *an employee* is placed at the

beginning of the sentence. The verb is in the verb phrase *shall be paid* which is composed of the past tense form of the action verb *pay* and the imperative phrase *shall be*. See *Transamerica Freight Lines, Inc v Quimby*, 381 Mich 149, 158-159; 160 NW2d 865 (1968). *Hadley v Ramah*, 134 Mich App 380, 387; 351 NW2d 305 (1984). The object is the concrete noun *compensation*.

The WDCA defines the words in the main clause. *An employee* is described by MCL 418.161(1)(a)-(n); MSA 17.237(161)(1)(a)-(n). See *Hoste v Shanty Creek Management*, 459 Mich 561; 592 NW2d 360 (1999), reh den 460 Mich 1201 (1999). The past tense of the verb *pay* is defined by MCL 418.801(1); MSA 17.237(801)(1) and by MCL 418.801(2), (3); MSA 17.237(801)(2), (3) which allows for penalties when compensation is *not paid*. *Compensation* is that which is *provided in this act* or the medical care that is described by MCL 418.315(1); MSA 17.237(315)(1); the vocational rehabilitation service described by MCL 418.319(1); MSA 17.237(319)(1); and the wage loss replacements described by MCL 418.351(1); MSA 17.237(351)(1) and MCL 418.361(1); MSA 17.237(361)(1) with the supplements that are allowed for catastrophic injury. MCL 418.521(1), (2); MSA 17.237(521)(1), (2).

The subordinate clause *who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury* is one kind of subordinate clause. One kind of subordinate clause is a relative clause which modifies a noun or a pronoun and commonly known as an adjectival clause by performing the same grammatical function in a sentence as an adjective. The other kind of subordinate clause is an adverbial clause which modifies a verb. The subordinate clause here is a relative clause because the antecedent which is modified is the noun phrase *an employee* in the main clause.

A relative clause can be restrictive or nonrestrictive. A restrictive clause is one that limits the meaning of the noun or pronoun which it modifies. Although subordinate, a

restrictive clause is essential to make the meaning of the sentence clear. When a restrictive clause is omitted the sentence has no meaning or the meaning is absurd. On the other hand, a nonrestrictive clause is one which only adds another idea to the sentence. The thought expressed by that nonrestrictive clause could also be expressed in a separate sentence. When a nonrestrictive relative clause comes within a sentence it must be offset by the use of a comma at the beginning and at the end. *Kales, supra. Winokur, supra.* The subordinate clause in the statute is a nonrestrictive relative clause by adding another idea to the sentence and is offset with commas.

The subordinate clause is a grammatical nonrestrictive relative clause by having a predicate, a verb, and subject. The predicate is the relative pronoun *who* which is grammatical as the singular form of the last antecedent *an employee* which is the subject of the sentence and which is modified by the subordinate clause. *Kales, supra,* 271.

The verb is the present tense action verb *receives* which is grammatical because the present tense verb is always used in a nonrestrictive relative clause to express a truth or requirement. Something which is always true or required must be expressed with a present tense verb. The present tense form of the action verb *receives* in the subordinate clause is why the sentence is a law by expressing the statement as a truth or as a requirement of the sentence. Grammatical errors are often made when a general truth expressed in a subordinate clause follows the past tense verb in the main clause of a sentence. For example, the sentence *He replied that Los Angeles is the largest city on the West Coast* is grammatical while *He replied that Los Angeles was the largest city on the West Coast* is not because of the use of the past tense verb form *was* in the subordinate clause. This common grammatical error is not present in the sentence. The present tense form of the action verb in the subordinate clause *receives* does not follow the past tense form of the action verb in the main clause which is *paid.* This is why the sentence is a law. It expresses the truth or requirement about the kind of *an employee* who *shall be paid.* The verb *receives* has a well

settled meaning. *Receives* is the action verb of *possession* or to get. *Thomas Canning Co v Johnson*, 212 Mich 243, 250; 180 NW 391 (1920).

The subject of the subordinate clause is the noun *injury* which is modified in two ways. One is the adjective *personal*. The noun phrase *personal injury* has a well settled meaning. A *personal injury* is damage to the person of an employee which is distinct from an existing injury or disease or the progressive effects of an existing injury or disease. *Marman v Detroit Edison Co*, 268 Mich 166; 255 NW 750 (1934). *Miklik, supra. Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993). The Court held in *Marman, supra*, 167,

> "[p]ersonal injury implies something more than changes in the human system incident to the general process of nature or existing disease or weakened physical condition. The term, as employed in the compensation act, contemplates some intervention which either procedures a direct injury or so operates upon an existing physical condition as to cause an injurious result, reasonably traceable thereto."

The Court reiterated this in *Miklik, supra*, 367, 369,

> "[i]n all successful workers' compensation cases, the claimant must establish by a preponderance of the evident both a personal injury and a relationship between the injury and the workplace. In heart cases, the first question is whether there is a heart damage. . . . heart damage is a matter of medical proof."

The conditions which do not constitute a *personal injury* are also well settled. Ruined clothing such as a torn shirt or soiled paints, damaged jewelry such as a necklace or watch, and broken implements such as glasses, a hearing aid or hairpiece are not a *personal injury* because the damage is to the property of the employee and is not to the person of the employee. *Romano v South Range Construction Co*, 8 Mich App 533; 154 NW2d 560 (1967). The loss of an interest which is established by contract with the employer or which the law may recognize is not a *personal injury* because that is damage to an intangible interest such as liberty and reputation. *Moore v Federal Department Stores, Inc*, 33 Mich App 556; 190 NW2d 262 (1971). *Milton v Oakland Co*, 50 Mich App 279;

213 NW2d 250 (1973). *Slayton v Michigan Host, Inc*, 122 Mich App 411; 332 NW2d 498 (1983). The court in *Moore, supra*, 559, held that an employer could not invoke the immunity from civil suit because MCL 418.131(1); MSA 17.237(131)(1) did not apply because the loss of liberty experienced by the employee was not a *personal* injury,

> "[i]t is plaintiff's claim that her humiliation, embarrassment, and depravation of personal liberty are not the type of 'personal injury' contemplated in the above quoted section. We agree.
>
> The Act has been interpreted to encompass physical and mental injuries which arise out of and in the course of one's employment. However, the gist of an action for false imprisonment is unlawful detention irrespective of any physical or mental harm. (citations omitted)"

Injury is also modified by two prepositional phrases which are adjectives of the word *employment*. The first prepositional phrase is *arising out of* and the other is *in the course of* employment and are joined by the word *and*.

The word *and* is a conjunction and is not a synonym for the word *or*. *Heckathorn v Heckathorn*, 284 Mich 677; 280 NW 79 (1938). *L. A Darling Co v Water Resources Comm*, 341 Mich 654; 67 NW2d 890 (1955). *Esperance v Chesterfield Twp*, 89 Mich App 456; 280 NW2d 559 (1979). The Court of Appeals said in *Esperance, supra*, 460-461, that,

> "[w]hile it is true that the use of the word 'and' in a statute usually connotes the conjunctive, this rule is not an absolute.
>
> > 'The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context.' *Heckathorn v Heckathorn*, 284 Mich 677, 681; 280 NW 79 (1938).
>
> Therefore, when it is clear that the Legislature intended to have the clauses read in the disjunctive, the word 'or' can be substituted for the conjunctive 'and'."

Part of the difficulty in parsing out the meaning of the word *and* expressed in *Esperance, supra,* occurs because of the relationship between conjunction and negation which is reflected by the principle of logic commonly known as DeMorgan's Rules that can be expressed as

not (x and y) equals not (x) or not (y)

while

not (x or y) equals not (x) and not (y)

The distribution of the negative through a phrase in a sentence commonly occurs in statutes which involve the prohibition of conduct such as *Thou shall not rape and murder.* A reader would intuitively apply DeMorgan's Rules to distribute the prohibition *Thou shall not* to mean *Thou shall not rape* ***or*** *murder.* Only the confused reader would believe that the prohibition applied only to the rapist who also kills. This problem is not present in the subordinate clause because there is no negative for distribution.

The other part of the difficulty with the meaning of the word *and* expressed in *Esperance, supra,* is in the relationship between conjunction and description in which a noun is modified by two adjectives (or adverbs) and expressed as

noun (x) has the properties of adjective (a) and adjective (b)

while

noun (x) has the properties of adjective (a) or adjective (b)

When adjective (a) and adjective (b) convey the same or a closely related idea the word *and* can be read as the word *or.* This phenomena was explained by several grammarians in *Sun Valley Foods Co, supra,* 237, n 6,

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"[6] Our conclusion is bolstered by several expert opinions offered to support defendant.

Professor Donald Hettinga, an English professor at Calvin College and contributor to the Harbrace College Grammar Handbook, stated:

> The conjunction *and* joins two separate clauses that set forth distinct conditions. The parallelism of that construction makes one expect that if there were a time constraint the phrase defining it would appear immediately after *is filed,* in other words, in an analogous position to the phrase *before the expiration of the (10-day) period.* However, as it stands that particular phrase has no grammatical authority over the stuff of the second clause–the matter of the bond.

Professor Joan Karner Bush, an English professor from the University of Michigan stated:

> [T]he adverbial phrase 'before the expiration of the (10-day) period' modifies the verb is taken. . . . You asked what the adverbial propositional clause 'before the expiration' modified: 'is taken' or 'is filed.' I believe the adverbial phrase modifies the verb 'is taken.' My decision is based on the assumption that in clear writing modifiers are placed as close to the word they modify as possible and the 'before the expiration' is closest to 'is taken.'"

An example of this phenomena is the statute in the WDCA which concerns misconduct by an employee, "[i]f the employee is injured by reason of his *intentional and wilful* misconduct, he shall not receive compensation under the provisions of this act." MCL 418.305; MSA 17.237(305) (emphasis supplied). Both the word *intentional* and the word *wilful* are adverbs describing the verb *misconduct* and convey the same idea so that the word *and* in section 305 can be read as or without changing the meaning of the sentence.

When the adjective (a) and adjective (b) convey different ideas the word *and* cannot be read as the word *or*. An example of this phenomena is also present in the WDCA which states that, "'[r]easonable employment' as used in this section, means work that is *within the employee's capacity to perform* that poses no clear and proximate threat to that employee's health and safety, *and* that is *within a reasonable distance from that employee's residence.*" MCL 418.301(9); MSA 17.237(301)(9), first sentence (emphasis supplied). The adjectival phrase *within the employee's capacity to perform* conveys an entirely different

idea from the other adjectival phrase *within a reasonable distance from that employee's residence* so that the word *and* is conjunctive. The word *and* cannot be read as *or* without confusing the meaning conveyed by section 301(9), first sentence.

And in the subordinate clause of the statute is conjunctive because the first prepositional phrase *arising out of* employment and the second prepositional phrase *in the course of* employment convey different ideas. The first prepositional phrase expresses the idea of *how* a personal injury occurs because of the gerund form of the verb *arise* (arising) which describes employment as the thing which produced the injury.

Employment is how an injury occurs when employment is the mechanism of injury. Employment is the mechanism of injury when equipment such as a press or tool injures; when an object such as a bag of cement or a box of widgets proves too heavy to handle; when the plant facility itself injures because of a slippery floor or falling down stairs; and even when a co-employee or customer pushes or fights with an employee. In all of these examples and countless others, a thing of employment is the mechanism or how the injury occurred.

The second prepositional phrase *in the course of* employment conveys the entirely different concept of time or *when* an injury occurs. The phrase *in the course of* conveys this by use of the verb *course* meaning *to pursue* or *the progress of time* such as the *course* of a week. While the word *course* can be a concrete noun such as a golf course, only the verb use makes any sense in the context of the subordinate clause. The noun in the first and second prepositional phrases is *personal injury* and the gerund form of the verb *arise* (arising) in the first prepositional phrase readily signals that there is another verb in the second prepositional phrase and not another noun.

In the course of employment deals with when the worker is performing service contemplated by the contract of employment. An injury occurs *in the course of* employment when an employee is performing service which is contemplated by the contract of

employment whether actually at the task assigned such as operating a press or driving a truck and some ancillary activity such as changing into work clothes in a locker room, reporting to personnel for a meeting or, to collect pay. It even includes the seemingly personal activity of personal hygiene in a restroom or eating in a lunchroom because rest breaks are contemplated by the contract of employment when a lounge or a lunchroom is provided by the employer. This explains why an injury during travel such as a car crash driving to an appointment, a fall at employer-provided lodging, and choking while eating a meal "on the road" is *in the course of* employment. In all of these circumstances, the employee is performing some service which was contemplated by the contract of employment.

That *and* in the subordinate clause is conjunctive is illuminated by two examples. One example involves two employees who are injured while operating a press. The first employee is hurt because a widget escapes from a clamp during production. The other employee has an epileptic seizure and is injured upon hitting the floor. For each of these two workers employment is *when* the injury occurred because both were performing service which was contemplated by the contact of employment by actually doing the task assigned. However, for the first employee, employment is also how the injury occurred because of the flying widget. For the other, employment is not how injury occurred because only the intrinsic condition of epilepsy was the mechanism for how that injury occurred.

The second example involves two employees who are injured falling down stairs at work. One employee is proceeding to a meeting with a supervisor while the other is proceeding to a meeting to complete an illicit drug sale. Employment is how both employees were injured because the mechanism for the injury to the two workers is the stairs of employment. However, the first employee is eligible for compensation because employment is also when the injury occurred because proceeding to a meeting with a supervisor is service that was contemplated by the contract of employment but other employee is not eligible for compensation because employment was not when the injury

occurred. The sale of illicit drugs is in no way a service contemplated by the contract of employment. Other, subtler examples exist in case law but all can be easily understood by considering the two prepositional phrases in the subordinate clause as particular terms which require employment as *how* and *when* injury occurred.

The indirect object of the subordinate clause is *an employer* which is modified by the phrase *who is subject to this act at the time of the injury* and is defined by the WDCA. MCL 418.115(a) - (e); MSA 17.237(115)(a) - (e). MCL 418.641(2); MSA 17.237(641)(2). Section 115(a) - (e) enumerates the employers that are subject to the WDCA. Section 641(2) defines employers that are not.

In sum, reading the statute in its grammatical context establishes that there is no ambiguity.

B. OTHER STATUTES IN THE WDCA DESCRIBE THE MARGINS OF THESE TWO REQUIREMENTS

Other statutes in the WDCA may be considered for the whole act is the proper reference. *Grand Rapids v Crocker*, 219 Mich 178, 182-184; 189 NW2d 221 (1922). *Metropolitan Council no. 23, AFSCME v Oakland Co Prosecutor*, 409 Mich 299, 317-319; 294 NW2d 578 (1980). *Crowe v Detroit*, 465 Mich 1, 6-7; 631 NW2d 293 (2001). The Court held in *Crowe, supra*, 6-7, that, "[c]ontextual understanding of statutes is generally grounded in the doctrine of noscitur a sociis: '[i]t is known from its associates,' see Black's Law Dictionary (6th ed) p 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting."

Other statutes confirm that the text and grammar of the subordinate clause require that employment must be both how and when the personal injury occurs by defining the margins of these two particular prepositional phrases. That is, *where, why,* and *what* injury occurred are subsidiary facts which establish the margins for *how* and *when* the injury occurred.

The WDCA describes a margin for when injury occurs by establishing a presumption for the second prepositional phrase of *in the course of* employment. MCL 418.301(3); MSA 17.237(301)(3). Section 301(3), first sentence, establishes the margin by the geography or place where an injury occurs by stating that, "[a]n employee going to or from his or her work while on the premises where the employee's work is to be performed, and within a reasonable time before and after his or her working hours, is presumed to be *in the course of* . . . employment." (emphasis supplied) Section 301(3), first sentence, presumes that employment is *when* an injury occurs by establishing a presumption from *where* the injury occurred. An injury at work which is presumptively when injury occurred still could be not *actually* when the injury occurred as in the prior example involving an illicit drug sale. Inversely, an injury at another place still could be shown to occur when employment was performed as with an employee traveling to a business meeting away from an office-work location. The noteworthy feature is that the presumption of section 301(3) concerns only the second prepositional phrase in the subordinate which confirms that it is discrete from the first prepositional phrase *arising out of.*

Section 301(3), second sentence, describes a margin for when an injury occurs by barring compensation for injury experienced during social or recreational activity. Section 301(3), second sentence, states that, ". . . an injury incurred in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act." This is a margin for when injury occurs by establishing that a certain activity, social and recreational activity, is beyond the rubric of *in the course of employment.* Certainly, this is a proper policy decision because social and recreational activity is generally not service which is contemplated by the contract of employment but is instead an emolument of employment. See *Eversman v Concrete Cutting & Breaking,* 463 Mich 86; 614 NW2d 862 (2000).

Another provision of the WDCA describes a margin for when injury occurs. MCL 418.301(10); MSA 17.237(301)(10). Section 301(10) is like section 301(3), first and second sentences, by describing a margin for the second prepositional phrase when injury occurs during criminal conduct,

> "[w]eekly benefits shall not be payable during the period of confinement to a person who is incarcerated in a penal institution for violation of the criminal laws of this state or who is confined in a mental institution pending trial for a violation of the criminal laws of this state, if the violation or reason for the confinement occurred while at work and is directly related to the claim."

Certainly, an employee injured while pursuing criminal conduct at work is performing no service which could be contemplated by a contract of employment.

Similarly, the WDCA establishes a margin for when an injury occurs by barring compensation for an injury experienced during wilful misconduct of the employee. Section 305 declares that, "[i]f the employee is injured by reason of his intentional and wilful conduct, he shall not receive compensation under the provisions of this act." As section 301(10), intentional misconduct by an employee cannot be said to be service contemplated by the contract of employment and so is beyond the rubric of *in the course of* employment.

The WDCA describes a margin for *why* an injury occurred. Section 131(1). MCL 418.141(a) - (c); MSA 17.237(141)(a) - (c). These statutes operate together to establish that *why* an injury occurred is only important when an employer intentionally injured the employee. Section 131(1), second, third and fourth sentences, state that,

> "[t]he only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge."

See *Travis v Dries & Krump Mfg Co*, 453 Mich 149; 551 NW2d 132 (1996).

Section 141(a) - (c) reflects that this is the margin for why an injury occurred by declaring that the negligent or unreasonable conduct of an employee, a co-employee or an employer is not important to understanding *arising out of*. Section 141(a)-(c) states that,

> "[i]n an action to recover damages for personal injury sustained by an employee in the course of his employment or for death resulting from personal injuries so sustained it shall not be a defense:
>
> (a) That the employee was negligent, unless it shall appear that such negligence was wilful.
>
> (b) That the injury was caused by the negligence of a fellow employee.
>
> (c) That the employee had assumed the risks inherent in or incidental to, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances."

What injury occurs is another margin of the subordinate clause. The WDCA establishes that only one kind of injury is presumed to *arise out of and the course of employment*. MCL 418.405; MSA 17.237(405). Section 405(1) and (2) state that,

> "[i]n the case of a member of a full paid fire department of an airport run by a county road commission in counties of 1,000,000 population or more or by a state university or college or of a full paid fire or police department of a city, township, or incorporated village employed and compensated upon a full-time basis, a county sheriff and the deputies of the county sheriff, members of the state police, conservation officers, and motor carrier inspectors of the Michigan public service commission, 'personal injury' shall be construed to include respiratory and heart diseases or illnesses resulting therefrom which develop or manifest themselves during a period while the member of the department is in the active service of the department and result from the performance of duties for the department.
>
> Such respiratory and heart diseases or illnesses resulting therefrom are deemed to *arise out of and in the course of employment* in the absence of evidence to the contrary." (emphasis supplied)

C. TWO OTHER STANDARDS ESTABLISHED BY THE WDCA APPLY ONLY AFTER THESE TWO REQUIREMENTS ARE ESTABLISHED

The WDCA establishes two other standards for eligibility to compensation. MCL 418.301(2); MSA 17.237(301)(2). MCL 418.375(2); MSA 17.237(375)(2). Section 301(2), first sentence, establishes a different standard for eligibility to compensation from section 301(1), first sentence, by stating that, "[m]ental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner." In *Farrington, supra*, and then in *Gardner v Van Buren Pub Schools*, 445 Mich 23; 517 NW2d 1 (1994), reh den 445 Mich 1205; 519 NW2d 898 (1994), the Court recognized that section 301(2), first sentence, established an additional requirement after the statute applied. The Court said in *Farrington, supra*, 216-217,

> ". . . the significant manner amendments, were designed to impose on claimants a higher standard of proof, whether the claim is brought under chapter 3 for specific injuries or under chapter 4 for occupational diseases.
>
> Thus, the legislative policy evidenced for heart disease after the 1982 amendments would restrict benefits to claimants under the second prong of *Kostamo*, as in the instant case, who could establish that their heart disease and injury were significantly caused or aggravated by employment. Included in this standard is the requirement that claimants also prove that the alleged cardiac injury resulting from work activities went beyond the manifestation of symptoms of the underlying disease. The heart injury must be significantly caused or aggravated by employment considering the totality of all the occupational factors and the claimant's health circumstances and nonoccupatonal factors."

Section 375(2), first sentence, also describes a different standard for eligibility to compensation from the statute by stating that,

> "[i]f the injury received by such employee was *the proximate cause* of his or her death, and the deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him or her for support, the death benefit shall be a sum sufficient, when added to the indemnity which at the time of death has been paid or becomes payable under the

> provisions of this act to the deceased employee, to make the total compensation for the injury and death exclusive of medical, surgical, hospital services, medicines, and rehabilitation services, and the expenses furnished as provided in sections 315 and 319, equal to the full amount which such dependents would have been entitled to receive under the provisions of section 321, in case the injury had resulted in immediate death." (emphasis supplied)

In *Hagerman v Gencorp Automotive*, 457 Mich 720, 738-739; 579 NW2d 347 (1998), reh den 459 Mich 1203 (1998) the Court recognized that section 375(2), first sentence, was a higher standard for eligibility to compensation that applied only after the terms of the statute were met,

> "[s]ubsection 375(2) adopts a higher standard for awarding benefits than that adopted in §301.
>
> Subsection 375(2) requires an analysis of whether death was proximately caused by the original injury. Subsection 301(1) requires only the question whether the injury arose out of and in the course of employment. The inquiry into whether a clear and unbroken chain of causation sufficient to show the injury was a directly and substantially related cause of death (subsection 375[2]) is not the same as an injury into whether there is a mere causal nexus between the injury or employment (subsection 301[1])."

Regardless of the validity of the precise description of the standard by the Court in *Hagerman, supra*, after *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), it remains that section 375(2) can apply only after the terms of section 301(1), first sentence, applies.

D. CASE LAW BEFORE *CARTER v GENERAL MOTORS CORP*, 361 MICH 577; 105 NW2d 105 (1960) REMAINS VALID

In the fifty years after the enactment of the WDCA in 1912 by 1912 (1st Ex Sess) PA 10, the Court always recognized that the text and grammar of the subordinate clause required that employment must be both how injury occurred as the mechanism of the injury and also that employment was when that injury occurred as when the employee was performing service contemplated by the contract of employment. *Rayner*

v Sligh Furniture Co, 180 Mich 168; 146 NW 665 (1914). *Hills v Blair*, 182 Mich 20; 148 NW 243 (1914). *Van Gorder v Packard Motorcar Co*, 195 Mich 588; 162 NW 107 (1917). *Sichterman v Kent Storage Co*, 217 Mich 364; 186 NW 498 (1922). *Appelford v Kimmel*, 297 Mich 8; 296 NW 861 (1941). *Rucker v Michigan Smelting & Refining Co*, 300 Mich 668; 2 NW2d 808 (1942). *Conklin v Industrial Transport*, 312 Mich 250; 20 NW2d 179 (1945). *Stornant v Licari - Packard Grosse Pointe, Inc*, 332 Mich 210; 50 NW2d 762 (1952). *Simkins v General Motors Corp (After Remand)*, 453 Mich 703; 556 NW2d 839 (1996). In *Simkins, supra*, 712-713, n 14, the Court recognized the case law before 1960 as the "old rule" in Michigan and accurately recapitulated it,

> "[u]nder the old rule in Michigan, there were two separate tests to determine whether an injury (1) arose out of and (2) in the course of the injured employee's employment: 'out of' related to the cause or source of the accident, whereas 'in the course of' related to time, place, and circumstances. See *Appelford v Kimmel*, 297 Mich 8, 12; 296 NW 861 (1941). However in *Whetro*, n 10 *supra at 242*, a plurality of this Court concluded that Michigan 'no longer requires the establishment of a proximately causal connection between the employment and the injury . . . .' This Court has more recently stated that this analysis from *Whetro* was not precedential. See *Dean v Chrysler Corp*, 434 Mich 655, 660-661; 455 NW2d 699 (1990). Regardless, Michigan cases have not employed this distinction and have generally used the entire phrase to refer to the connection between the injury and employment. Welch, Workers' Compensation in Michigan: Law & Practice (3d ed), §4.1, pp 4-1 to 4-2. We do not address this question regarding whether the two phrases require a separate test."

This observation was entirely correct. In *Hills, supra*, 25, the Court recognized the importance of the two prepositional phrases in the subordinate clause by stating that,

> "[u]nder the provisions of this act, only that employee is entitled to compensation who 'receives personal injuries arising out of and in the course of his employment.' It is to be borne in mind that the act does not provide insurance for the employed workman to compensate any other kind of accident or injury which may befall him. * * * 'Out of' refer to the origin, or cause of the accident, and he words 'in the course of' to the time, place, and circumstances under which it occurred."

In *Appelford, supra*, 11-13, the Court held,

"[i]n *Hopkins v Michigan Sugar Co.*, 184 Mich. 87, 90, 91 (L. R. A. 1916A, 310), the court said:

'It is well settled that, to justify an award, the accident must have arisen 'out of' as well as 'in the course of' the employment, and the two are separate questions to be determined by different tests, for cases often arise where both requirements are not satisfied. An employee may suffer an accident while engaged at his work or in the course of his employment which in no sense is attributable to the nature of or risks involved in such employment, and therefore cannot be said to arise out of it. An accident arising out of an employment almost necessarily occurs in the course of it, but the converse does not follow. 1 Bradbury on Workmen's Compensation, p. 398. 'Out of' points to the cause or source of the accident, while 'in the course of' relates to time, place, and circumstances. *Fitzgerald v Clarke & Son*, 2 K. B. (1908) p. 796.

In *Pearce v Michigan Home & Training School*, 231 Mich. 536, the following rule laid down in *McNicol's Case*, 215 Mass. 497 (102 N. E. 697, L. R. A. 1916A, 306), was adopted:

It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed, and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment."

There are more than two score decisions by the Court before 1960 that all recognize that the text and grammar of subordinate clause require the two discrete circumstances of employment as both how and when an injury occurred. *Conklin, supra,* 255-256. As important, all of the decisions before 1960 acknowledge that the facts about where, why, and what injury occurred were subsidiary ideas needed only to understand the dimensions of how and when required by the subordinate clause. *Daniel v Murray Corp of America*, 326 Mich 1, 11; 39 NW2d 229 (1949), "[t]he test applied and followed [in *Appelford, supra]* was not *where* the injury occurred, but whether it occurred while the

employee was still within the ambit of . . . employment." Similarly, the Court appreciated that the cause or why the injury occurred with the fault or prior knowledge of the employee or employer was not important except as a margin to the topic of when the injury occurred. *Crilly v Ballou*, 353 Mich 303, 308, 320; 91 NW2d 493 (1958), "[c]ompensation . . . was not to be barred by fault, or neglect, or inattention, that is, for the mere human failings of the workmen" and "[t]he employer's knowledge, actual or constructive, . . . acquiescence, . . . condonation, are not essential to the compensability of an injury under our statute." Finally, what kind of injury occurred was never important. There was no special rule in the case law because an employee experienced a broken leg, a heart attack or had a mental illness. *Hills, supra*, (physical trauma), *Marman, supra*, (heart attack), and *Klein v Len H Darling Co*, 217 Mich 485; 187 NW 400 (1922) (mental disability-delirium) were all decided with the same standard of law in the subordinate clause.

Van Gorder, supra, represents only a good example of the application of the statute. In *Van Gorder, supra*, an employee experienced a personal injury from a fall while working on a scaffold. Certainly, employment was *when* the injury occurred because the employee was performing service which was contemplated by the contract of employment to meet the requirement of the second prepositional phrase in the statute *in the course of* employment. However, work was not *how* the injury occurred because the mechanism of the fall was intrinsic to the employee, a seizure, which did not satisfy the requirement of the first prepositional phrase in the statute *arising out of*. The Court emphasized that had the mechanism of the fall been a thing of employment such as the scaffold itself collapsing, the requirement of the first prepositional phrase would have been met,

> "[the employee] was performing the ordinary services of his trade, that of a plumber and steam fitter. He was standing on a scaffold a few feet from the floor. There is no claim that the scaffold was improperly constructed or in any way unsuitable for the service. Due to no conditions arising out of his employment, but solely to his predisposition to epilepsy . . . he fell from the scaffold, receiving an injury . . ." *Van Gorder, supra*, 597.

That *Van Gorder, supra,* is only a shining example of the proper application of the statute is revealed by the cases which follow it. *Wilson v Phoenix Furniture Co,* 201 Mich 531; 167 NW 839 (1918). There, compensation was awarded because the mechanism of the injury *was* a thing of employment, a nail protruding from the floor at work,

> ". . . the fall which plaintiff suffered was caused by tripping on a nail protruding from the floor. While plaintiff testifies that at times he had been dizzy and weak, he also testifies that it was nothing to speak of, but slight, and never sufficient to cause him to lose his balance and fall." *Wilson, supra,* 534.

This mechanism of a thing of employment which was the nail in the floor satisfied the first prepositional phrase in the statute.

The statute differs from the statute as it was in the cases decided before 1960 in ways that are not at all important. Originally, the statute stated that, "[i]f an employee . . . receives a personal injury arising out and in the course of his employment by an employer who is subject to this act, he shall be paid compensation in the manner and to the extent herein after provided." 1912 (1st Ex Sess) PA 10. The statute was amended in 1943 by 1943 PA 245 to state that,

> "[a]n employee, who receives a personal injury arising out of and in the course of his employment by an employer who is at the time of such injury subject to the provisions of this act, shall be paid compensation in the manner and to the extent hereinafter provided, or in case of his death resulting from such injuries such compensation shall be paid to his dependents as hereinafter defined." MCL 412.1; MSA 17.151, first sentence.

Section 412.1 was not only a complex sentence because of the subordinate clause within the main clause but also a compound sentence because of the word *or* which introduced the added subject of *death* in the phrase *in case of his death resulting from such injuries such compensation shall be paid to his dependents as hereinafter defined.* The statute was again amended so that the compound sentence was eliminated and the two topics expressed in two separate sentences. 1954 PA 175. The second topic sentence is now section 301(1), second sentence, "[i]n the case of death resulting from the personal

injury to the employee, compensation shall be paid to the employee's dependents as provided in this act."

The change in the main clause from *in the manner and to the extent hereinafter provided* to *as provided in this act* is cosmetic. Certainly, the change in the description of the object of the main clause does not affect the meaning of the subordinate clause.

Some decisions before 1960 discuss *why* an injury occurred because of the term *accidental injury* in the report to the Legislature concerning the need for compensation and in the title of the WDCA. The term *accidental injury* was used throughout the report to the 1911 Legislature that enacted the WDCA. *Beauchamp v Dow Chemical Co*, 427 Mich 1, 6, 7-8; 398 NW2d 882 (1986),

> "[i]n 1911, the Legislature created a 'commission of inquiry to make the necessary investigation, and to prepare and submit a report . . . setting forth a comprehensive plan and recommending legislative action providing compensation for accidental injuries or death of workmen arising out of and in the course of employment . . . '
>
> The problem addressed in the report was reparations for 'accidental'[13] injury under the existing system of negligence liability. There is no discussion in the report of intentional torts by employers.
>
> B
>
> The workers' compensation act enacted in 1912 put into effect the proposals made by the commission. The act provided compensation for the 'accidental injury to or death of employees.'[14] Although workers' compensation coverage was made elective for those in the private sector, the 'so-called right of choice to come or not to come under this statute was something less than real' because whether the employer elected coverage or not the three common-law defenses were abolished for employment injuries.[15] If the employer elected coverage, however, he was not subject 'to any other liability whatsoever, save as herein provided for the death of or personal injury to any employe for which death or injury compensation is recoverable under this act . . . '[16] The Legislature had essentially rewritten the law governing accidental injuries in employment by addressing the criticisms of the existing system of liability for negligence in employment."

The term *accidental injury* was used in the title of the WDCA when first enacted. *Twork v Munising Paper Co*, 275 Mich 174, 177-178; 266 NW 311 (1936),

> "[p]art 1, § 4, of the act (2 Comp. Laws 1929, § 8410) uses the words 'death' and 'personal injury.' The title, however, reads:
>
> 'An act to promote the welfare of the people of this State, relating to the liability of employers for *injuries* or death sustained by their employees, providing compensation for the *accidental injury* to or death of employees and methods for the payment of the same, establishing an industrial accident board,* defining its powers, providing for a review of its awards, making an appropriation to carry out the provisions of the act, and *restricting the right to compensation or damages in such cases to such as are provided by this act.*'" (emphasis by the Court)

The adjective *accidental* modifying *injury* in the report to the Legislature and in the title of the WDCA when first enacted was the reason for the concern with the role of employment from the perspective of *why* an injury had occurred which was proper because the title of a statute may be considered to understand its meaning. *Twork, supra. Jacobson v Carlson*, 302 Mich 448; 4 NW2d 721 (1942). The Court in *Twork, supra*, 178-179, 180, recognized this and that,

> "[t]he court vas unanimous in its application of the reasoning of Mr. Justice STONE in the *Adams Case, supra,* to the facts presented in that ease, and a study thereof will readily *indicate that he, as well as those who drafted the act,* used the phrases 'accidental injury' and 'personal injury' somewhat interchangeably, limited, however, by the unexpected nature of the injury to the person affected thereby.
>
> 'There is no question but what plaintiff's injuries arose out of and in the course of his employment *and we think it may fairly be said plaintiff's injuries were the result of accident.*" (emphasis supplied)

The change in the title when the WDCA was amended in 1943 that deleted the adjective *accidental* meant only that the perspective of *why* an injury occurred was not important as a central concern. The case law before 1960 remains valid because the two perspectives about *how* and *when* a personal injury occurred still remain in the subordinate clause.

E. CASE LAW BETWEEN *CARTER v GENERAL MOTORS CORP*, 361 MICH 577; 106 NW2d 105 (1960) AND *KOSTAMO v MARQUETTE IRON MINING CO*, 405 MICH 105; 274 NW2d 411 (1979) IS NOT VALID

Before 1960 the Court proceeded with restraint. The Court recognized the statute and fully appreciated that the subordinate clause required two discrete terms by citation or quotation of the word or phrase involved. The Court always found the text and grammar of the statute plain and precise. Not once did the Court say that the statute was unclear or ambiguous. The decisions did not even purport to construe the meaning of the statute but only resolved questions about whether the particular facts there were within the rubric of one or other of the required circumstances. Finally, the doctrine of stare decisis was a very real and serious rule. Case law was reversed only when there was a change in the text of the WDCA. For example, the Court reversed *Daniel, supra,* in *Dyer v Sears, Roebuck & Co*, 350 Mich 92; 85 NW2d 152 (1957) because of the enactment of section 301(3), first sentence. *Dyer*, supra, 96,

> "I vote, then, to resurrect *Haller* and *Brink*; to implement the quoted amendment by overruling *Daniel* and its progeny including *Salmon* and *Mack*, and to reinstate for applicability to cases such as we have at bar *Brink's* original and rightful interpretation of said section 1. That interpretation, which is now reinforced by the foregoing amendment of 1954, is quoted from *Brink*."

This attention to the text of the statute, obedience to case law and change only with the change in the text of the WDCA is the core of judicial restraint. The Court was then carrying out the law as it was written and so was the agent of the Legislature accurately reflecting the values and experience of the political process in a democratic society. This judicial restraint fulfills the function of the judiciary as a coordinate branch of government.

In 1957, the Court announced disengagement from restraint and pursued a course of judicial activism. Judicial activism is not the number of cases decided or avoided. A judicial activist can be lazy and decide but one or two cases. Rather judicial activism is an elliptical way of saying that the *grounds* for a decision were derived from a self-perceived

result and disengaged from the statute. It is a process of ad hoc proclamation that is usually characterized in court decisions as part of some evolving standard of law. Sowell, *The Vision of the Anointed, Self-Congratulations as a Basis for Social Policy*, 219-220, 226-235 (Basic Books) 1995. Judicial activism cannot be qualified or excused because the result of a particular case can be explained with the proper application of a statute when the announced construction is in derogation of the text.

In 1957, the Court reversed *Curtis v Hayes Wheel Co*, 211 Mich 260; 178 NW 675 (1920) in *Van Dorpel v Haven-Busch Co*, 350 Mich 135; 85 NW2d 97 (1957). The actual ruling was activist because of the reasoning which was used to achieve the result. Indeed, the Court recognized and embraced judicial activism by stating that,

> "[a] little sense of proportion and realism in this area might not be amiss. The plain fact is that courts of last resort everywhere constantly engage in a form of 'judicial legislating' when they are confronted–as they so often are–by statutory or other provisions of ambiguous or uncertain meaning. Such judicial interpretations often in effect add words to a statute. Must we act at our peril that we might possibly be wrong? Some judges solemnly declare that we must. Yet far from being the doctrine of humility and keeping our places that they would have it appear, is not this essentially to preach the gospel of judicial infallibility? Scarcely a term of this Court passes that all of us are not obliged to interpret unclear statutes. Occasionally we must reinterpret them. It is one of our primary functions; that's what we are here for. It is only when a judge ignores or flies in the face of a positive and unambiguous statutory enactment that he may justly be accused of judicial legislating, in the bad sense." *Van Dorpel, supra*, 153.

Indeed, the Court saw absolutely no difference in deciding the rules of common law and in deciding the meaning of statutes,

> ". . . we can see no basic difference between a court overruling its former case law and overruling its former interpretation of a statute."

And while the result was one that was correct by applying the restrained rule of statutory construction that a general statute can operate when a specific statute does not, the activism of the Court in *Van Dorpel, supra*, cannot be denied. The Court did not reach

the result by the ruling that general disability could apply at the end of the scheduled disability for the physical loss but because "nothing had changed but the hearts and minds of men." *Van Dorpel, supra*, 153.

This announced process of judicial activism was later carried out in the cases that were decided by the Court after 1960 when the Court attacked the subordinate clause with the fulsome purpose of collapsing that text as a limitation and enlarging entitlement for one class of litigant *an employee*. This occurred with the decisions in no fewer than a dozen cases. *Carter v General Motors Corp*, 361 Mich 577; 106 NW2d 105 (1960). *Baas v Society for Christian Instruction*, 371 Mich 622; 124 NW2d 744 (1963), reh den 371 Mich 655; 126 NW2d 721 (1964). *Howard v City of Detroit*, 377 Mich 102; 139 NW2d 677 (1966). *Zaremba v Chrysler Corp*, 377 Mich 226; 139 NW2d 745 (1966). *Burchett v Delton-Kellogg School*, 378 Mich 231; 144 NW2d 337 (1966). *Whetro v Awkerman*, 383 Mich 235; 174 NW2d 783 (1970). *Nemeth v Michigan Building Components*, 390 Mich 734; 213 NW2d 144 (1973). *Thomas v Certified Refrigeration, Inc*, 392 Mich 623; 221 NW2d 378 (1974). *Harrison v Tireman & Colfax Bump & Repair Shop*, 395 Mich 48; 232 NW2d 274 (1975). *Deziel v Difco Laboratories, Inc (After Remand)*, 403 Mich 1; 268 NW2d 1 (1978), reh den 403 Mich 955 (1978). *Kostamo v Marquette Iron Mining Co*, 405 Mich 105; 274 NW2d 411 (1979). In comparison, the cases that the Court decided after 1960 concerning other terms in the main clause of the statute were far and few between. See *Betts v Ann Arbor Pub Schools*, 403 Mich 507; 271 NW2d 498 (1978).

All of these decisions studiously ignored the text of the subordinate clause and stare decisis to produce a host ad hoc rules and ultimately, in *Deziel, supra*, no rule. Throughout the era the Court did not once find a word in the statute that was imprecise or unclear or some grammatical error. In true activist style, the Court observed an evolution in the case law meaning of the subordinate clause although no important amendment occurred. See *Whetro, supra*, 243, n 6, "See Appendix 'A' for cases indicative of the

evolution of the law in Michigan." Usually, florid language about the law was used as the Court said in *Van Dorpel, supra,* 153,

> "[n]o living man can possibly measure the amount of poverty and pain and human indignity suffered by Michigan workmen and their families because of the unfortunate *Curtis Case*. It has lain across the jugular vein of workmen's compensation far too long. Rather than attempt to distinguish that case--as we are aware we might--we prefer to sweep away the last vestiges of the *Curtis Case* and at long last align Michigan squarely behind the more modern and liberal decisions which refuse to limit workmen's compensation benefits to the scheduled allowance. We believe it is time for the *Curtis Case* to go."

and in *Deziel, supra,* 30,

> "[t]his 'poignant judicial cry' can only be explained if it is understood that *all* people manufacture their own concepts of reality. 'Normal' persons are those who manufacture a reality which most closely parallels that which the vast majority of 'average' people encounter. Psychoneurotics and psychotics fail to manufacture or encounter the same reality because their reactions and adjustment mechanisms either distort, warp or completely fail.
>
> However, their distorted concept of reality is just as 'real' for them as the average person's concept of reality is for him. This is the critical insight." (emphasis by the Court)

The noteworthy feature of *Van Dorpel, supra,* is that the change in the "hearts and minds of men" were not the hearts and minds of men who were legislators but who were judges. Likewise, the feature of *Deziel, supra,* was the *judicial* cry and not a *legislative* cry. The proclaimed basis for decision was the political choice between the competing class of employees and employers. In particular, the Court created a principle of statutory construction that was based only upon the status of the parties with the employee embraced as a ward of the Court whose status required construing the WDCA in a way to award compensation. *Deziel, supra,* 34-35, n 14, "[b]y progressively or liberally, this Court means 'for compensation.' If a disabling injury is incurred and the general circumstances lead to the conclusion that it was work-related, compensation should be awarded," and the employer as a target whose arguments could be casually dismissed as if from a person who

did not really have any standing to object because it was the consumer of the product or service that would *really* pay for any increased cost, *Carter, supra*, 585-586, or from one who was simply an alarmist, *Deziel, supra*, 35-36,

> "[e]mployers are concerned that the utilization of a strictly subjective causal nexus standard in cases involving mental disabilities may encourage malingering,[15] shamming and outright fraud. This Court understands and shares the employers' concern, even though that apprehension may be slightly exaggerated."

Carter, supra, started the dissembly of the subordinate clause by striking the term adjectival phrase *personal injury* and replacing it with *disability*. The Court said in *Carter, supra*, 580, 585-586,

> "*[b]*enefits are not awarded for the *injury* as such but rather for the *loss of earning capacity*. Hence, even this Michigan Court, years ago, recognized the right of claimant under the act to compensation for loss of such earning capacity caused by a mental or emotional disability resulting from a physical injury to a fellow employee of claimant. In due course we shall examine the authorities so holding, including decisions of this Court made venerable by age and by the compelling logic of their reasoning, for it is upon those past decisions of this Court that our decision in this case is firmly planted. Our decision is that workmen's compensation benefits are payable for *incapacity to work* because of claimant's paranoid schizophrenia arising out of and in the course of employment.
>
> * * *
>
> The second point, whether or not plaintiff suffered a disability compensation under the act, presents a more difficult question. This Court has previously held that emotional disabilities are compensable under the act. *Klein v Len H darling Co.*, 217 Mich 485; *Karwacki v General Motors Corporation*, 293 Mich 355; *Hayes v Detroit Steel Casting Co.*, 328 Mich 609; and *Redfern v Sparks-Withington Co., supra*. Whether the cause of such emotional disability is a direct physical injury (*Redfern v Sparks-Withington Co.*) or a mental shock *(Klein v Len H Darling Co.), we have held the disability compensable. What* distinguishes the case at bar from our other decisions which recognize the compensability of such disabilities is that this plaintiff's disability was caused by neither a single *physical* injury to plaintiff nor by a single mental shock to him. Instead, his disability was caused by emotional pressures produced by production line employment not shown by him to be unusual in any respect, –that this, not show shown by him to be any

> different from the emotional pressures encountered by his fellow workers in similar employment. As noted above, the finding of causal relationship between plaintiff's *disability* and the pressures of his employment was supported by the evidence." (emphasis supplied)

This was a studied disregard of the text of the subordinate clause which explicitly refers to a *personal injury* and was a profound change from extant case law. The authorities such as *Klein, supra,* that the Court cited in *Carter, supra,* explicitly recognized the requirement of *personal injury* and were even distinguished on that very ground. *Carter, supra,* is more disturbing than for citing case law that was distinguishable. The Court anointed itself as the arbiter of the standard for eligibility by replacing *personal injury* with *disability* because *disability* was not then defined. *Disability* was decided only by the Court. The process for deciding *disability* would be driven by no empirical standard and only by the status of the parties as the Court proclaimed in *Carter, supra,* 585-596, "[t]he question then becomes, must industry, under our laws, bear the economic burden of such disability?" This was no question at all. To propound it was to answer it. Quite plainly, *Carter, supra,* was no legal enquiry but a political process in which the employee was viewed as a ward and the employer as a target.

The next decision made this entirely clear. In *Baas, supra,* the Court was equally divided in a case involving a teacher injured driving from home to school. Those Justices for reinstating the decision denying compensation did so on the basis of stare decisis, *Murphy v Flint Board of Education,* 314 Mich 226; 22 NW2d 280 (1946). *Baas, supra,* 625, 626. These Justices pointed out that employment was not how the injury occurred which was consistent with *Murphy, supra,* and the text of the subordinate clause *arising out of* employment,

> "[t]he instant case and *Murphy v Flint Board of Education, supra,* are similar in the following respects: (1) In both cases plaintiff's claimed the proper performance of their duties as a teacher required them to work at home; (2) Both plaintiff's were injured while journeying between their schools and their homes and both were carrying school books and papers; (3) In

> both cases the records justify the conclusion that teachers engaged in school work prepare work when necessary outside the school in which they are employed; (4) Neither was injured at home *because of homework or carrying papers or books,* nor was either injured while *working on papers or books during travel from school to home,* and the hazards of street travel would have been the same if they had completed their work at school; (5) Neither was provided transportation as part of her employment and both could travel from school to their homes in any way they chose." *Baas, supra,* 624-625 (emphasis supplied)

The Justices against this ominously said,

> "[n]ow will someone rise here and say what all reversers are so far chary of saying; that is, that Mrs. Baas was not at the time 'engaged in any specific mission for her employer'? Failing that, are we not plunged ever deeper into that 'wilderness of doubt and confusion' former Justice TALBOT SMITH wrote of in the section 1 case of *Sheppard v Michigan National Bank,* 348 Mich 577, at 601?
>
> The *Sheppard Case,* all 58 pages of it, was written in 1957. Now, with the handing down in 1963 of this similarly divided case, have we not cast section 1 again into that nebulous world of demi-law we know too well? All one can answer now is that better preceded surely must be ahead, as our personnel continues inevitably to change and change again."

Here is the open expression that how the personal injury occurred was not at all important. The dispositive issue was only the other requirement of the subordinate clause, concerning when injury occurred. These Justices obsessively attended to the fact that the teacher did work at home which very well might establish that the activity as service that was contemplated by the contract of employment was *in the course of* employment but then studiously ignored that employment was not how injury occurred.

Three years later, *Baas, supra,* was distinguished in *Howard, supra,* and then reversed in *Burchett, supra. Burchett, supra,* announced that how the injury occurred was not important ostensibly because that analysis was "fruitless." Now the only important circumstance was *when* the injury occurred,

> "[r]ather than engage in a fruitless query of whether the fact that *plaintiff was transporting papers and books contributed in any*

> way to her injuries, as was done in *Baas*, we should instead see if plaintiff meets the dual-purpose rule." *Burchett, supra*, 236.

While the test expressed in *Burchett, supra*, was and remains sound for understanding whether the injury occurred when employment was pursued by describing factors suggesting whether travel was contemplated by the contract of employment, *Burchett, supra*, 236[1], it was and remains no explanation at all for turning aside from the first prepositional phrase about whether employment was how the injury occurred.

The repudiation of stare decisis was a hallmark of these decisions. The reversal of *Baas, supra*, in *Burchett, supra*, was nothing when *Zaremba, supra*, is considered. There, the Court said,

> "[n]otwithstanding anything we may have said in prior cases, we hold that an accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, *whatever the degree of exertion or the condition of his health*, provided the exertion is either the sole or a contributing cause of the injury. In short, that an injury is accidental when either the cause or result is unexpected or accidental, *although the work being done is usual or ordinary*." (emphasis added by the Court). *Zaremba, supra*, 231.

Zaremba, supra, was activist in three ways. There was a wholesale rejection of stare decisis with the pronouncement that "[n]otwithstanding anything we may have said in prior cases . . . " The grounds for the decision were disengaged from the subordinate clause as the Court emphasized the cause of injury or why had injury occurred "provided the

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[1] "[t]he rule has been reduced to a simple formula: If a special trip would have had to be made if the employee had not combined this service with his going or coming trip, then the dual-purpose rule applies. A recognized authority on workmen's compensation further subdivides this test into several questions: Does the employer expect or command teachers to transport papers home for correction? Does the employer provide time and facilities for doing this work on the employer's premises? Or, alternatively, is the teacher transporting these papers home for her convenience? Finally, the all conclusive question: If the teacher failed to transport the papers would the employer find it necessary to hire someone else to complete this task?"

exertion is either the sole or a contributing *cause* of the injury" (emphasis supplied) when the first prepositional phrase of the subordinate clause concerned only how injury occurred. The decision was ad hoc. It was not reconcilable with *Carter, supra,* which replaced *disability* for *injury*. Here then was the start of different standards for different kinds of injury.

Full dissembly of the subordinate clause occurred in the case decided after Burchett, supra. In *Whetro, supra,* the Court said that an employee was eligible for compensation by establishing only the second prepositional phrase. The fact that the mechanism of the injury was extraneous to employment (a tornado) did not matter. The Court was quite candid about all of this by citing the decision in another case, from another jurisdiction, that said an injury need **not** *arise out of employment,*

> "Michigan law is paralleled by the development of the law in England and Massachusetts–the two jurisdictions which served as Michigan's model in the original legislative drafting and judicial construction of the workmen's compensation act.
>
> * * *
>
> The Massachusetts court said in *Baran's* case, p 344: 'We think that they [recent cases] disclose the development of a consistent course which is a departure from the earlier view expressed, for example in *McNichol's* case. * * * The injury 'need *not arise* out of the nature of the employment. * * * The question is whether his employment brought him in contact with the risk that in fact caused his death'" *Whetro, supra.*

This was activist. The Court abandoned the text and grammar of the subordinate clause. The Court abandoned stare decisis. See *Whetro, supra,* 246-247 (BLACK, J., dissenting). The Court referred to an "evolution" of case law, *Whetro, supra, 242-243, 244-245, that represented no such thing. Every single case cited by the Court* involved a circumstance in which employment was *both* how the injury had occurred and when the injury had occurred because the employee was then performing service that was contemplated by the contract of employment. Indeed, the Court in *Whetro, supra,* 241,

actually rebuked the Court of Appeals for recognizing the very distinction required by the subordinate clause,

> "[t]he Court of Appeals was able to distinguish between a tornado and a bolt of lightning as a causative force of injury and base its decision affirming the award for Carl Whetro on the reasoning of the Massachusetts supreme court in *Caswell's* case (1940), 305 Mass 500 (26 NE2d 328), wherein recovery was allowed for injuries received when a brick wall of the employer's factory was blown down on workmen during a hurricane. This 'contact with the premises' met the requirement that the injury arise 'out of' the employment in the mind of the Court of Appeals.
>
> We are unable to accept the distinction drawn between a tornado and bolt of lightning when viewed as the cause of an injury."

As the Court of Appeals observed, *Caswell's Case*, 305 Mass 500; 26 NE2d 328 (1940) involved an injury to an employee because a brick wall of the factory collapsed. Clearly in that case, employment was how the injury occurred. The building of the employer was the mechanism of the injury. Why that mechanism was animated (a storm) was not important. The "lightning" cases involved no such mechanism of employment. In *Klawinski v Lake Shore & M S R Co*, 185 Mich 643; 152 NW 213 (1915) and through *Kroon v Kalamazoo Co Rd Comm*, 339 Mich 162; NW2d 641 (1954) the mechanism of the injury was lightning. How the injury occurred was the non-employment mechanism of weather and so the requirement of *arising out of employment* did not occur and compensation not available even though employment had been when the injury occurred to meet the *requirement of in the course of employment.*

Whetro, supra, was the flower of activism as the Court proudly resolved a legal problem on the basis of the status of the parties as the employee was identified as a ward who required singular protection by considering of the consequence of the rule upon employees,

> "[t]he purpose of the compensation act as set forth in its title is to promote the welfare of the people of Michigan relating to the liability of employers for injuries or death sustained by their

> employees. The legislative policy is to provide financial and medical benefits to the victims of work-connected injuries in an efficient, dignified, and certain form.
>
> * * *
>
> The economic impact on an injured workman and his family is the same whether the injury was caused by the employer's fault or otherwise."

The employer was a target whose arguments were dismissed out-of-hand with the insinuation that the employer did not really even have standing to object because industry would not actually bear the consequence, "[t]his act allocates the burden of such payments to the most appropriate source of payment, the consumer of the product." *Whetro, supra*, 242.

While *Whetro, supra*, did not garner a majority, see *Dean v Chrysler Corp*, 434 Mich 655; 455 NW2d 699 (1990), reh den 435 Mich 1204 (1990), it did soon had that effect as the plurality opinion was applied in the next several cases. *Nemeth, supra*. *Thomas, supra*. In these two cases the Court presumed that eligibility for compensation required only that employment was when the injury occurred to meet the requirement of *in the course of* employment as was said in *Whetro, supra*, and then proceeded to enlarge the margin for that. In *Nemeth, supra*, an employee was injured using equipment after the end of work to make a part for a hobby after obtaining the approval of the employer. The Court cited *Whetro, supra*, 736, 737, and proceeded to enlarge the concept of when injury occurred by enlarging the concept of the activity that could be contemplated by the contract of employment with a discussion of goodwill or fostering good labor relations contemplated by the employer. *Nemeth, supra*. The unexpressed belief to "promote and maintain good employee-employer relationship," *Nemeth, supra*, was contemplated by the contract of employment. The Court emphasized that the employee had "received his employer's permission," *Nemeth, supra*, 735, and then cited *Crilly, supra*, *Nemeth, supra*, 736, which was particularly odd for *Crilly, supra*, had pointedly emphasized that the knowledge of the

employer was not relevant. *Crilly, supra,* 319. This underscores the ad hoc character of the decision.

In *Thomas, supra,* an employee was injured after delivering a child to school in a vehicle owned by the employer. *Thomas, supra,* 626. The Court said that the mere possession and operation of the vehicle for any purpose was *in the course of* employment because that was contemplated by the contract of employment, "[i]t is a fair conclusion . . . that [the employee] and the other employees . . . were performing a service . . . in taking company vans home, caring for them there and displaying the company name and slogan . . . . " *Nemeth, supra,* 630. This "conclusion" was simply a policy decision and not a legal analysis. An equally fair "conclusion" was that the use of the vehicle was an emolument of employment. Indeed, this policy choice clearly vexed the Court itself when formulating the rule.

The next cases decided by the Court similarly enlarged the margins for when an injury occurred at work. *Harrison, supra,* concerned section 305 describing intentional and wilful misconduct as a margin of the second prepositional phrase of the subordinate clause. The Court recognized the very pointed disagreement about the events, *Harrison, supra,* 48-49, but then said that *were* the employee the aggressor and the employer inflicting injury in self defense then wilful misconduct by the employee would apply. This represented only the recognition that wilful misconduct was a margin for when employment was pursued. Wilful misconduct by an employee is not activity contemplated by the contract of employment.

The last major decision of the era was *Deziel, supra,* in which the Court completely collapsed the text and grammar of the subordinate clause. The Court held that compensation was available for a certain kind of injury-disability when the employee *thought* that employment was a factor. *Deziel, supra,* 26. There, the Court held,

> ". . . as a matter of law, that in cases involving mental (including psychoneurotic or psychotic) injuries, once a plaintiff

> is found disabled and a personal injury is established, it is sufficient that a strictly *subjective* cause nexus be utilized by referees and the WCAB to determine compensability. Under a 'strictly *subjective* causal nexus' standard, a claimant is entitled to compensation if it is factually established that claimant *honestly perceives* some personal injury incurred during the ordinary work of his employment 'caused' his disability. This standard applies where the plaintiff alleges a disability resulting from either a physical or mental stimulus and honestly, even though mistakenly, believes that he is disabled due to take work-related injury and therefore cannot resume his normal employment." (emphasis by the Court)

This ruling completed the process announced in *Van Dorpel, supra,* engaged in *Carter, supra,* and pursued in the later cases. Indeed, *Carter, supra,* was the only case law cited *Deziel, supra,* 31. The principal features of *Deziel, supra,* are

- abnegation of the text and grammar of the subordinate clause. The prepositional phrase *of employment* was redacted to *of imagination.*
- expression of one rule for physical injury, *Whetro, supra,* and another for a different kind of condition *mental disability, Deziel, supra.*
- the Court as the sole arbiter of the description of the new initiating term, *mental disability. Deziel, supra,* 23, n 8. There, the Court said that the *mental disability* that would initiate the rule would not be described there-and-then and ostensibly awaited further cases.
- the rule to enhance treatment of one class (employees) as a ward of and the dismissal of objections to the rule from a target (employer).

In *Deziel, supra,* 34-35,

> ". . . the injury and the subsequent disability must arise 'out of and in the course of' employment. But this very general notion of causation was and should always be read progressively or liberally. The primary goal of workers' compensation is to compensate a worker for his disability. When there is doubt which might lead a court to deny recovery under the tort law system, recovery under workers' compensation law is often allowed. Compensation for disability takes preference over any subsidiary doubts about the existence of an objective causal nexus."

Clearly, this rule did not depend upon the text or grammar of the statute or the context with other statutes and favored the class of employees because of that status over the differing class of employers whose arguments to the contrary were dismissed as "exaggerated,"

> "[e]mployers are concerned that the utilization of a strictly subjective causal nexus standard in cases involving mental disabilities may encourage malingering shamming an outright fraud. This Court understands and shares the employers' concern, even though that apprehension may be slightly exaggerated." *Deziel, supra,* 35-36.

The last decision of the activist era was *Kostamo, supra.* In *Kostamo, supra,* 126, the Court recapitulated *Zaremba, supra,* and then simply cemented it by stating, "we do not add to or disturb those precepts."

F. CASE LAW AFTER *KOSTAMO v MARQUETTE IRON MINING CO*, 405 MICH 105; 274 NW2d 411 (1979) IS CONSISTENT

After *Kostamo, supra,* the Court continued to explore the meaning of the subordinate clause. *McClure v General Motors Corp (On Reh),* 408 Mich 191; 289 NW2d 631 (1980). *Bush v Parmenter, Forsythe, Rude & Dethmers,* 413 Mich 444; 320 NW2d 858 (1982). *Miklik, supra. Hammonds v Highland Park Police Dept,* 421 Mich 1; 364 NW2d 575 (1984), reh den 421 Mich 1202 (1985). *Hurd, supra. Dean, supra. Pierce v General Motors Corp,* 443 Mich 137; 504 NW2d 648 (1993), reh den 444 Mich 1201; 509 NW2d 152 (1993). *Simkins, supra. Camburn v Northwest School District/Jackson Community School,* 459 Mich 471; 592 NW2d 46 (1999). These decisions represent a return to restraint first in result and finally, in pronouncement. Indeed, *McClure, supra,* 203-205, recognized the *Carter - Kostamo* era as one of judicial activism,

> "[o]ur brothers, writing for reversal of the Workers' Compensation Appeal Board decision and reaffirmance of *McClure* I, would add this case to a line of recent decisions in which this Court has expanded and broadened the sweep of workers' compensation coverage by judicial decision.[4]

> To follow that course here would see this Court effect more worker compensation law 'reform' of its own, unchecked by burdensome legislative committee hearings, union and management testimonial expertise, cost analyses, consideration of the effect upon related social legislation and the risk of rejection following bicameral debate or of executive veto.
>
> We decline to continue the ongoing dilution of the legislative requirement that, as a condition of compensability, an employee's injury must be suffered 'out of and in the course of his employment' by first equating 'circumstance of employment' with 'out of and in the course of employment', and finally substituting the newly created judicial standard for the longstanding legislative norm. We cannot agree with our colleagues that:
>
> > 'The significant inquiry in the instant cases is not whether the employees were injured while carrying out duties absolutely required by their employment contracts, but whether the injuries occurred as a circumstance of the employment relationship.'
>
> We are of the view, of course, that neither of the stated alternatives is the 'significant inquiry'; that the significant inquiry is whether the injuries arose 'out of and in the course of his employment.'"

This did not garner a majority which itself speaks volumes. But the decision was restrained for there was a return to the requirements of the subordinate clause. The employee in the case of *McClure, supra*, was not eligible for compensation when hit by an auto crossing the street from a tavern to the work place. Employment was not how the injury occurred because the mechanism was a car driven by person not associated with work and the inattention of the employee from imbibing. Employment was not when the injury occurred because the Employee was reporting to work and not performing a service contemplated by the contract of employment. This straight-forward analysis does not depend on law beyond the WDCA as Justice Levin thought was important.

In *Bush, supra*, an employee-lawyer was shot and killed by an unknown assailant after an evening "on the town" before returning home from a professional seminar. *Bush, supra*, 446-449. Although the Court could have excluded eligibility because employment was not how injury had occurred because the mechanism was a gunshot at the

hands of another person in no way associated with work such as a co-employee or customer, the decision continued with whether employment was when the injury occurred by deciding *in the course of* employment. The Court concluded that initially it was when injury occurred as it was contemplated by the contract of employment with the employer-law firm having "encouraged and . . . paid for all of the expenses incurred." *Bush, supra,* 450, but then continued to consider whether the conduct when the employee was actually injured was activity that was contemplated by the employment contract and concluding that it was not. *Bush, supra,* 459-460. The restraint of the Court in *Bush, supra,* was in recognizing that a contrary analysis would "create a rule which could never be applied." *Bush, supra,* 460. The judicial restraint was begrudging as activist decisions of *Thomas, supra,* were cited as the framework for the decision.

Miklik, supra, revisited the problem. There, the Court described the parameters of *personal injury* but more important here, work had to be how injury occurred. The Court said in *Miklik, supra,* 370,

> "[t]here must be a relationship proved between the damage and *specific* incidents or events at work. General conclusions of stress, anxiety, and exertion over a period of time do not satisfy this second requirement. There must be enough detail about that which precipitated the heart damage to enable the factfinder to establish the legal connection . . . ." (emphasis by the Court)

The Court then inventoried the facts that could serve to establish that employment was *how* the injury had occurred,

> "[t]he *Kostamo* Court noted several examples which have been regarded as significant by courts and commentators: temporal proximity of the cardiac episodes to the work experience, hot and dusty conditions, repeated return to work after a cardiac episode, and mental stress."

Miklik, supra, was an unspoken return to the requirement of the subordinate clause that work must be both how and when an injury occurred. The requirement in *Miklik, supra,* of specific circumstances of employment flatly contradicted the activism of *Carter,*

supra, that had allowed employment per se as how an injury occurred and of *Deziel, supra*, that had allowed *imagined* events.

Hammonds, supra, presented the Court with a unique choice between the activist decision of *Deziel, supra*, because the employee had a mental disability, or the restrained decision of *Miklik, supra*, because the employee had physical injury by a self-inflicted gun shot. The Court rejected the activism of *Deziel, supra, Hammonds, supra*, 16-17, and applied the restraint of a chain-of-causation standard. *Hammonds, supra*, 14-16. The Court said in *Hammonds, supra*, 14-15,

> ". . . agree with Justice SOURIS, the City, Professor Larson,[18] and commentators generally, [19] who have urged the adoption of the chain-of-causation test, that the questions of causation or intervening causation and intention should not turn on whether the worker knows what he is doing. A mind disoriented by physical or mental pain may be so impaired in its reasoning capacity that, although aware of the choices, it is incapable of rational choice.[20]
>
> The requisite causal connection between a work-related injury and death is not broken by an act that is the product of work-related mental injury and resulting impaired capacity for rational decision and choice. The impairment in the capacity for rational decision-making and an act of suicide resulting from such impairment are consequences of the mental injury and not separate of intervening causes. If the work results in mental injury and the mental results in suicide, the suicide is compensable."

The chain-of-causation standard in *Hammonds, supra*, is largely the same as *the proximate cause* standard described by the Act when a death occurs after a personal injury. Section 375(2), first sentence. Indeed, the only remarkable aspect of *Hammonds, supra*, was the failure to recognize section 375(2), first sentence.

In *Peters v Michigan Bell Tel Co*, 423 Mich 594; 377 NW2d 774 (1985), and *Hurd, supra*, the Court recognized the activism that culminated in *Deziel, supra*, was rejected by the Legislature in enacting 1980 PA 357. The Court said in *Hurd, supra*, 534,

> "[t]his Court holds that MCL 418.301(2); MSA 17.237(301)(2) was enacted to invalidate this Court's decision in *Deziel v Difco Laboratories, Inc. (After Remand)*, 403 Mich 1; 268 NW2d 1

> (1978), thus effecting a substantive change in the law and that the provisions of this amendment have prospective application."

The only remarkable aspect was the refusal to re examine *Deziel, supra,* on the ground that it could create a third standard "for . . . the complex question of liability for alleged work related mental disability." *Peters, supra.* Mental disability was "complex" only because the Court had made it so by ignoring that the WDCA did not concern itself with what kind of *personal injury* had occurred and fashioning a unique rule in *Deziel, supra,* for illnesses that it could not even begin to inventory. In *Dyer, supra,* there had been no inhibition to apply another amendment (that had described a margin for *when*).

The most recent decisions on the subject are restrained. In *Simkins, supra,* the Court returned to the analysis of the WDCA before 1960 by starting with the text of the statute. *Simkins, supra,* 710. There, the Court observed the three elements of subordinate clause, *personal injury, arising out of,* and *in the course of* employment as discrete terms. *Hills, supra.* In *Camburn, supra,* the Court considered a claim by an employee-teacher injured driving from home to a professional seminar. *Camburn, supra,* 474. The Court recognized that when the injury occurred the employee was not performing service contemplated by the contract of employment and was not *in the course of* employment. *Camburn, supra,* 477, 478,

> "[i]n *Marcotte, supra,* at 677, [the Court of Appeals] quoted with approval from § 27.31(c) of Professor Larson's treatise which now states in pertinent part:
>
> > As to the attending of conventions, institutes, seminars, and trade expositions, compensability similarly turns on whether claimant's *contract of employment contemplated* attendance as an incident of his work." (emphasis supplied)

The contract of employment did not contemplate the activity of the employee when the injury occurred because the employer had not required or financed either the trip or the function at the end of the trip. Compensation was not available because the activity

pursued by the employee when the injury occurred was not so contemplated by the contract of employment as so the terms of the second prepositional phrase was not present. There was no need for an analysis of whether employment was the mechanism of injury because the auto was owned by the employer.

G. THE COURT OF APPEALS WAS WRONG

Perhaps not too surprisingly, the Court of Appeals has struggled with the decisions of the Court concerning the subordinate clause. This has occurred in three kinds of cases: assaults, traveling employees, and intrinsic illness.

In *Murdock v Michigan Health Maintenance Organization*, 198 Mich App 532; 499 NW2d 394 (1993), lv den 444 Mich 862; 505 NW2d 861 (1993), the Court of Appeals considered a claim for compensation for an assault because an employee was injured at work when knocked to the floor by a co-employee with whom there was romantic involvement. *Murdock, supra*, 534. The case should have been easily resolved by applying the second prepositional phrase. Certainly, the first prepositional phrase *arising out of* was satisfied because employment was how the injury occurred as the mechanism of the injury was a co-employee who first argued and then pushed the employee down. The second prepositional phrase *in the course of* employment involving when the injury occurred appeared satisfied as the argument and shove were at work when the co-employee interrupted a meeting between the employee and a supervisor. However, this second requirement was not actually met because the employee was not performing service contemplated by the contract of employment. It cannot be gainsaid that the lover's quarrel was not service contemplated by the contract of employment. A lover's quarrel is not performing the task assigned and is not an activity that was contemplated by the contract of employment such as a trip to the restroom or to the lunchroom which *is* contemplated by the employment contract although personal functions of hygiene and eating are done. This

straightforward analysis could not occur because of the grounds for the earlier activist decisions that had categorized arguments in three ways,

> "[t]here are three categories of cases in which compensation is sought for personal injuries, usually assaultive, between employees. Where the employees argue over work matters, any resulting injury is deemed to be work-related. *Harrison v Tireman & Colfax Bump & Repair Shop*, 395 Mich 48; 232 NW2d 274 (1975); *Andrews v General Motors Corp*, 98 Mich App 556; 296 NW2d 309 (1980). Where the subject of the dispute is not work-related, but is caused by the friction and strain of proximity imposed by the workplace, the injury may be deemed to be work-related. *Crilly v Ballou*, 353 Mich 303; 91 NW2d 493 (1958). In the third category, injuries arising from personal disputes imported into the workplace are not considered to be work-related, and hence are noncompensable. *Horvath v La Fond*, 305 Mich 69; 8 NW2d 915 (1943); *Slusher v Pontiac Fire Dep't*, 284 Mich 657; 280 NW 78 (1938); *Morris v Soloway*, 170 Mich App 312; 428 NW2d 43 (1988); *Devault v General Motors Corp*, 149 Mich App 765; 386 NW2d 671 (1986)."

Another assault case was *Devault v General Motors Corp*, 149 Mich App 765; 386 NW2d 671 (1986), lv den 425 Mich 879; 389 NW2d 864 (1986). What is remarkable is that a straightforward application of the second prepositional phrase *in the course of* employment would have solved the problem because the attack by a co-employee was a similar personal dispute which was a lover's triangle, *Devault, supra,* 768, "the origin of [the assaulting co-employee] animosity toward [the employee] was [the] relationship [of a spouse] with [the employee who was previously married to the employee but then married to the assaulting co-employee]." Instead, the court had to embark on an analysis of case law and distinguish the cases of *Whetro, supra*, etc.

Traveling employees have vexed the Court of Appeals which have attempted to employ a presumption that an injury during travel arose out of and in the course unless there was a *substantial deviation* a la *Bush, supra*. See, e.g., *Eversman, supra*, 226-227.

The final kind of case is the intrinsic illness or so-called idiopathic condition case. *Ledbetter v Michigan Carton Co*, 74 Mich App 330; 253 NW2d 753 (1977). In the case of *Ledbetter, supra*, the court considered a claim for compensation by an employee who

was injured in a fall because of an intrinsic illness or condition while at work (epilepsy). The case could have been easily decided by applying the first prepositional phrase of the subordinate clause. That is, employment was not *how* the injury occurred because work was not the mechanism of the injury. The mechanism or how the injury happened was the *personal condition of epilepsy. There was no employment mechanism such as a red strobe* inducing the seizure or a slip on some oil. The Court of Appeals did not pursue this otherwise straightforward analysis and was compelled to analyze the case from no less than three perspectives because the activist decisions of *Whetro, supra,* and *Deziel, supra. Ledbetter, supra,* 335-336,

> "[t]he requirement that the employment be connected to the injury by way of aggravating or accelerating the harm creates a distinction between neutral risk and personal risk cases. In neutral risk cases, such as those considered in *Whetro, supra,* the connection is supplied by the fact that the injury occurs on *the premises of the employer (or at a location where business* is to be conducted) *and* that the employment itself required the employee to be at that location where exposure to the risk occurred. In personal risk cases, including idiopathic fall situations, the sole fact that the injury occurred on the employer's premises does not supply enough of a connection between the employment and the injury. Unless some showing can be made that the location of the fall aggravated or increased the injury, compensation benefits should be denied.
>
> The policy justification for this line of analysis in personal risk cases has been adequately expressed by Professor Larson:" (emphasis supplied)

Other cases involving traveling employees include *Bush, supra, Whetro, supra,* and *Thiede v G D Searle & Co,* 278 Mich 108; 270 NW 234 (1936). Although involving employees injured during travel and subject to analysis that way, the case law is not one continuum when the grammar of the statute is borne in mind.

In *Thiede, supra,* 109, an employee died from the injuries that were sustained in a fire at the hotel which was provided by the employer for lodging during travel to customers,

> "[the employee] stopped at the Kerns Hotel in furtherance of... employment and that the necessity thereof was recognized by [his] employer. The causes of death were shock, partial suffocation from smoke, broken bones and internal injuries sustained when [the employee] in [an] attempt to escape the fire, leaped from the third story of the hotel."

The Court observed that there the hotel was an instrument of employment and that the presence there by the employee was service which was contemplated by the contract of employment. *Thiede, supra,* 113, ". . . it was a condition of [the employee's] employment that he should stay at the hotel" and "[the Employee] was required to stay at a hotel . . . in performance of . . . business." That instrument of employment was the mechanism or how the employee was injured and ultimately, died when the hotel was swept by the fire.

These facts met both of the requirements of the subordinate clause. The employee experienced a *personal injury* with the broken bones, the internal injuries, etc. *Thiede, supra,* 109. That personal injury was *arising out of* employment because an instrument of employment which was the hotel was the mechanism or how the injury occurred by catching fire. And that personal injury was *in the course of employment* because the Employee was performing service contemplated by the contract of employment when the injury occurred having been required to stay there. The cause for the mechanism or *why* the fire started was not discussed by the Court because the statute did not ask *why* injury occurred. *Thiede, supra,* then can be seen as simply one of scores of cases the Court decided before 1960 applying the discipline of grammar to decide the quid sit or definition.

Whetro, supra, involved different facts. There, an employee was injured and another died when a tornado destroyed the place where work was performed. One employee was working at home. The other employee was at a hotel which was provided by the employer for lodging during travel to customers. *Whetro, supra, 239-240,*

> "[C]arl Whetro was injured when the tornado destroyed the residence wherein he was working for his employer and seeks reimbursement for his medical expenses. Henry E. Emery was

> killed when the motel in which he was staying while on a business trip for his employer was destroyed by the tornado, and his widow seeks compensation for his death."

In *Whetro, supra,* how the employees were injured or died was not an instrument or mechanism from employment. It was not the hotel which was leased by the employer for work as in *Thiede, supra,* but instead the environment, (a tornado). The Court did not reject the predicate by those employers that the mechanism of the injury was an act *of God* or an act *of nature* and at least implicitly, accepted the fact that the mechanism was not *of employment. Whetro, supra,* 240. This readily distinguishes the cases from *Thiede, supra.* Again, in one case, *Thiede, supra,* employment was both how and when the injury occurred and in the other, *Whetro, supra,* employment was only when injury occurred.

In *Bush, supra,* the employee was shot by a robber returning from a trip to a meeting. The Court decided that the injury was not *in the course* of employment or not during service which was contemplated by the contract of employment because there was so substantial a deviation from travel from the meeting place to home. However, the proper way to decide the case was from the first prepositional phrase *arising out of* employment because the mechanism or how the injury occurred was extrinsic to employment, it was a thief.

As should be obvious, the Court can reject the categorization of claims as assaults, traveling employees and intrinsic illnesses with the case law standards in favor of the text and grammar of the statute which can apply to resolve each in a direct and coherent way. Indeed, the categorization leads to difficulty because the categories easily overlap as *Bush, supra,* is both a traveling and an assault case and *Eversman, supra,* is both a traveling and an intrinsic illness case.

In this case, the statute bars compensation because the Employee meets only one of the two requirements. It is not denied that the injury occurred when the Employee was performing service which was contemplated by the contract of employment by driving

to different appointments or errands as part of the job as a manager. This met the *in the course of* employment test. However, it cannot be denied that employment was not how the injury occurred because the auto did not fail such as a tire blow out, brake failure, or an engine explosion. The mechanism or how the injury happened was extrinsic to employment. The mechanism or how the injury happened was intrinsic to the Employee with the loss of self-control and self-decision from the insulin reaction.

RELIEF

Wherefore, amicus curiae Michigan Self-Insurers' Association prays that the Supreme Court reverse the Court of Appeals.

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